



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: A. C. MRIMA, J.]

CRIMINAL CASE NO. 10 OF 2018

REPUBLICPROSECUTOR

VERSUS

EDWIN OTIENO WANYARA..... ACCUSED

RULING ON CONFESSION

1. **Edwin Otiemo Wanyara**, the accused person herein, was charged with the murder of **Arthur Arwa Obuolo** (hereinafter referred to as '**the deceased**'). He denied the information. A trial was ordered.
2. Five witnesses testified before this Court retired to come up with this ruling. The witnesses were **Kilion Obuoro Aruwa (PW1)**. He was a son of the deceased and a neighbour to the accused person. **PW2** was **Dr. Victor Awinda Omollo**. The wife of the deceased testified as **PW3**. She was **Alice Akinyi Aruwa**. A Scenes of Crime Expert testified as **PW4**. He was **No. 79093 Corp. James Olago**. **PW5** was **No. 231201 ASP Stephen Mutua**. He was the DCIO Migori.
3. **PW5** testified that he recorded a statement in the nature of a confession from the accused person. He wanted to produce the statement as an exhibit. The accused person objected. This Court ordered a trial-within-a-trial to ascertain the admissibility of the statement.
4. The trial-within-a-trial was conducted. The prosecution called two witnesses. They were **PW5** and the Investigating Officer **No. 43478 Corp. James Mwangi**. The accused person also testified. He did not call any witness.
5. The Investigating Officer narrated how he was tasked by **PW5** to investigate the case involving the death of the deceased. He proceeded to the scene. He saw and viewed the body of the deceased. He then removed and accompanied the body to Migori County Referral Hospital Mortuary.
6. The Investigating Officer then recorded statements from witnesses. In the course of the investigations the Investigating Officer learnt that the accused person had been arrested in connection with the death of the deceased and that he was held at the Migori Police Station.
7. The Investigating Officer further testified that on one morning at around 08:30 am he went to the Migori Police Station with a view of getting the accused person for interrogation. He stated that he managed to get the accused person from the police cells after complying with the mandatory preliminary issues including making an entry in the Occurrence Book (OB) for a temporary removal from the cells. The Investigating Officer could not however remember the OB number. According to the Investigating Officer the accused person had no complaint and had no visible injuries or signs of any pain. The accused person confirmed that he had taken breakfast.
8. Upon having custody of the accused person the Investigating Officer also stated that he led the accused person to his office. His office was in the General Office at the DCI offices. It was about 500 metres from the police cells. The Investigating Officer sat down with the accused person in the office. The accused person sat on a chair. The Investigating Officer then explained to the accused person in Kiswahili language why he had removed him from the police cells. The accused person who was fluent in Kiswahili language readily agreed to be interrogated.
9. In the course of the interview the Investigating Officer realized that indeed the accused person was confessing to the killing of the deceased. He stopped the interview and informed the accused person that he was not competent in law to record a confession. He left the accused person to see if **PW5** could assist him. He met **PW5** seated in his office and the Investigating Officer requested **PW5** to record the confession. **PW5** agreed.
10. The Investigating Officer returned to his office and informed the accused person that **PW5** will record his statement. The accused person agreed. The Investigating Officer led the accused person to the office of **PW5**. He introduced the accused person to **PW5**. The accused person sat down on one of the many chairs in the office of **PW5**. The Investigating Officer then left.

11. PW5 later called the Investigating Officer and handed over to him the statement. The Investigating Officer read it and was satisfied that it was a confession. The statement *inter alia* narrated how the killing of the deceased was planned and executed by among others the accused person.
12. During cross-examination the Investigating Officer stated that he was aware that the father of the accused person had been attacked and beaten by members of public and his house torched. He was also aware that another person had been lynched by the irate members of public over the death of the deceased. The Investigating Officer was further aware that a brother of the accused person one **David Okinyi Wanyara** had also been attacked and beaten by members of public, but he was rescued by the police. The Investigating Officer told the Court that by the time the accused person was arrested two of his close family members had already faced the wrath of the members of public.
13. The Investigating Officer did not ascertain whether the accused person could read and write. He could also not tell whether the accused person was forced to confess or that he was tortured by the police.
14. Closing his testimony, the investigating officer stated that he was not aware of any external pressure on the accused person. He also confirmed that there were no members of public at the police station.
15. PW5 also testified. He stated that on 30/04/2018 at around 09:00am he was in his office when the Investigating Officer approached him and requested him to assist in recording a confession. He agreed. The accused person was availed to him while in his office. PW5 introduced himself to the accused person. He also enquired from the accused person if he still wanted to confess. The accused person answered in the affirmative and insisted that he wanted to say the truth.
16. PW5 sat down with the accused person as the investigating officer left. According to PW5 the accused person did not have any complaint and was not under any threat. PW5 explained to the accused person the charge which the police were intending to prefer against him. He also briefly gave the accused person the circumstances leading to the death of the deceased. He also gave out the name of the deceased.
17. As PW5 wanted to be sure that the accused person really wanted to confess he administered some three questions. The accused person answered all the questions. First, the accused person confirmed that he had not been tortured or beaten in the cells. Second, the accused person confirmed that he had been given all the essentials like breakfast and water. Third, the accused person confirmed that he had not been induced or forced to confess.
18. PW5 then informed the accused person his right to have a representative present. The accused person declined to have any representative as he feared that the information would spread and his life threatened.
19. A Charge and Caution was administered on the accused person. The accused person opted to proceed with the statement. He chose to use Kiswahili language. According to PW5 the accused person was very fluent in Kiswahili language. The accused person informed PW5 that he could read and write but nevertheless requested PW5 to record the statement for him. PW5 did so.
20. After recording the statement PW5 prepared and signed a Certificate of recording the statement. The statement and the Certificate were both signed by PW5 and the accused person. He translated the statement to English. He also prepared and signed a Certificate of translation. He was later bonded to appear in Court as a witness. PW5 availed the Original statement in Kiswahili language, the Certificates and the Charge and Caution statement for Court's perusal. PW5 identified the accused person in Court as the one who had recorded the statement from.
21. On cross-examination PW5 stated that he had previously recorded many like confessions. He clarified that he asked the accused person the language he wanted to use and he opted to use Kiswahili language. PW5 also stated that the accused person did not tell him of the attack on his father, but that another suspect had been killed by mob injustice.
22. The prosecution closed its case on the trial-within-a-trial.
23. The accused person testified he was aware of the charge before Court but not the confessionary statement. He however stated that he recalled being escorted to the office of PW5 by 2 police officer while he was being assaulted. He was ordered to confess. That, in the process he was injured on the head.
24. The accused person further stated that he was forced to use Kiswahili language which he did not understand and his plea to use Dholuo language was rejected. The accused person also denied having been put through any questions as alleged by PW5. He was also not informed of his right to call a representative. He did not recall asking PW5 to record his statement and he averred that he was forced to sign the confession while being beaten.
25. The accused person denied ever knowing the deceased or the suspect who was killed by members of public. He denied the contents of the confession.
26. The accused person was cross-examined. He stated that he dropped out of K'Odero Primary School in Standard 5 due to lack of school fees in 2017. He however clarified that no fees were chargeable in primary schools by then. He also clarified that the teachers used Kiswahili language but he did not understand anything. He further stated that English language was not among the subjects taught in the school.
27. The accused person admitted that he did not inform his Counsel or the Court about the torture claims. He also admitted that he had attempted to escape from lawful custody during one of the hearings of this case. That, he was arrested, charged and sentenced accordingly. He also admitted that the evidence of PW5 was vouched by the photographs but he wondered who had so told PW5.

28. At the close of the defence case Counsel for the accused person filed written submissions. **Mr. Kimanthi** for the prosecution briefly submitted orally. He submitted that the confession was taken within the Rules and that there was no breach. The confession was voluntary and that the accused person did not raise the issue of torture until during the trial. He submitted that the accused person sustained the injury on the head as he attempted to escape from lawful custody. He prayed that the confession be admitted as part of the prosecution's exhibits.

29. The foregone is the background upon which this Court is to determine the admissibility of the confession. I will start with the law on confessions.

30. **Section 25** of the **Evidence Act, Cap. 80** of the Laws of Kenya (hereinafter referred to as '**the Act**') defines a confession as follows: -

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

31. **Section 25A (1)** of **the Act** further provides where a confession can be made as follows: -

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in Court before a judge, a magistrate or before a police officer (Other than the investigating officer), being an officer not below the rank of inspector of Police, and a third party of the person's choice.

32. Further to **the Act**, there is a subsidiary legislation which also provides for confessions. It is the **Evidence (Out of Court Confessions) Rules, 2009** (hereinafter referred to as '**the Rules**'). **The Rules** provide for the procedure in recording confessions.

33. **The Act** and **the Rules** were enacted before the promulgation of the **Constitution of Kenya, 2010**. The **Constitution** now provides for confessions in **Article 49(1)(d)** as follows: -

(1) An arrested person has the right –

(a)

(b)

(c)

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

34. **Article 49(1)(d)** of the **Constitution** is what is largely referred to as '*the Rule against self-incriminatory evidence*'.

35. The **Constitution** is the supreme law of the land. There is no any other law which is either superior to or can contradict the **Constitution**. In other words, what the **Constitution** provides is final. **Article 25** of the **Constitution** states that the right of a person not to be compelled to give any confession is one of the rights that cannot be limited whatsoever.

36. Resulting therefrom I must hence ascertain whether the accused person was compelled into giving and signing the statement or confession.

37. **The Black's Law Dictionary, 10th Edition, Thomson Reuters Edition** at page 342 defines the word '*compel*' as follows: -

To cause or bring about by force, threats, or overwhelming pressure.

38. The accused person contended that he was forced to sign the statement. He alleged that he signed as he was being assaulted by two police officers. In proof of the assault the accused person relied on some wounds on his head. He posited that the wounds were inflicted during the signing of the statement.

39. It is true the accused person did not lodge any complaint over his health. Apart from the police station the accused person appeared before Court when he was represented by Counsel. The issue of assault was not raised. The issue only arose during the trial. The accused person could not answer why he chose to remain silent over such a serious matter. The accused person did not even name or indicate that he knew the officers whom he allege assaulted him. His assertion bordered on generality.

40. The accused person initially stated that he dropped out of school in Standard 5 in 2017 due to lack of school fees. He then admitted that in 2017 no primary school charged fees in Kenya. He further stated that English as a subject was not taught in the primary school he was in. He also said that he never understood Kiswahili at all in school. My clear understanding is that there is no primary school in Kenya where English is not taught as a subject. Again, the **Constitution** provides for compulsory basic education in Kenya. Every child must go to school. No fees whatsoever are charged in primary schools. No child is supposed to drop out of school especially in primary school.

41. I am convinced that the accused person opted to be untruthful during the mini-trial. There are obvious issues which the accused person was not forthright on. He denied even basic and obvious issues like the teaching of English subject in schools. There is also a likelihood that

the accused person sustained the wounds during his attempted jailbreak.

42. The totality of my assessment on the defence put forth by the accused person on the statement is that the defence is not plausible. The accused person was not truthful. The accused person was not compelled to give or sign the statement.

43. Having so found I must however go further to ascertain whether the statement was recorded in accordance with the law. That brings me to **the Rules**.

44. As I said earlier **the Rules** are a yardstick to which statements are gauged to qualify to be confessions. A voluntary statement which does not meet the threshold in **the Rules** will not aid the prosecution.

45. I will now juxtapose **the Rules** against how the statement was recorded. **Rule 4** states as follows: -

4. Rights of an accused person.

(1) Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person -

(a) has stated his preferred language of communication;

(b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;

(c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

(d) is informed of his right to have legal representation of his own choice;

(e) is not deprived of food, water or sleep;

(f) has his duration, including date and time of arrest and detention in police custody, established and recorded;

(g) has his medical complaint, if any, adequately addressed;

(h) is availed appropriate communication facilities; and

(i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under Rule 5.

2. The recording officer shall not record a confession from any accused who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.

3. The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person.

46. From the record **Rule 4** was duly complied with.

47. **Rule 5** is on cautioning of the accused person before recording the statement and the requirement that the time and place where the statement is recorded be part of the statement. I find that the **Rule** was also complied with. **Rule 7** requires the recording officer to offer the accused person the opportunity to record his or her own statement. That was done.

48. **Rules 8 and 9** provides as follows: -

8. At the conclusion of the recording, the accused person shall be offered the opportunity to clarify anything he has said and to add anything he may wish.

9. The recording officer shall ensure that the written confession or electronic recording media contains the following certificate at the end of the confession, in the original language of the person:

“I have read the above statement and I have been that I can correct, alter or add anything I wish. The statement is true. I have made it of my own free will.”

49. I have carefully reviewed the statement. I did not come across such a Certificate or a statement duly signed by the accused person to that effect.

50. The purpose of the Certificate is for the accused person to own the statement. The Certificate guards against instances where an accused person may voluntarily give a statement in a certain manner but it ends up being recorded in a different manner. The effect of **Rules 8 and 9** is to guard against such.

51. For us to understand the thrust of **the Rules** we need to look at the ancestry of the amendments that led to the enactment of **Section 25A of the Act** and **the Rules** and the **Article 49(1)(d)** of the **Constitution**. The Court of Appeal in **Ekai vs. Republic (1981) KLR 569** captured it so well. That Court's pronouncement was replicated by a differently constituted Court in 2015 in **Malindi Criminal Appeal No. 1 of 2013 Sango Mohammed Sango & Another vs. Republic (2015) eKLR** as follows: -

It is important to bear in mind that the amendments regarding confessions that were introduced to the Evidence Act by Act No 5 of 2003 and Act No 7 of 2007 were informed by the prevailing concern arising from consistent claims of use of torture by the police to extract confessions from suspects. The concern was never about confessions to private citizens. Thus for example, in EKAI v. REPUBLIC (1981)KLR 569 this Court sounded the concern in the following terms.

Accusations of ill-treatment are often made against police officers, sometimes with justification. In fairness both to the police and to the accused person, we would like to suggest that consideration be given to amending the Evidence Act to provide that no statement in the nature of a confession made to a police officer of whatever rank be admissible in evidence against a person accused of a criminal offence. Such statements should only be admissible if made to a magistrate, no policeman being present and a carefully prescribed procedure should be followed by the magistrate including giving a formal charge and caution followed by questions as to whether the accused person has any complaints relating to his treatment or is suffering from any injuries and if apparent a note should be made of such injuries, and of any complaint which may be made..

52. I will now consider the effect of failure to comply with **Rules 8 and 9**? To me, the failure renders the statement of no probative value at all. Such a statement has no force of law. Even if the statement is admitted into the Court's evidential record still it cannot be relied upon to be a basis of any finding. The foregone is fortified by the following finding by the Court of Appeal in **Sango Mohammed Sango & Another vs. Republic** (supra): -

Other than stating that the appellants had confessed to killing the deceased, the trial court did not consider the circumstances under which the confessions were made. Nor did it address the question of a trial within trial after the appellants, in their defences, repudiated the confessions. The trial court too did not warn itself of the danger of relying on repudiated confessions. The trial court too did not warn itself of the danger of relying on repudiated confessions or even address its mind to the reliability of the repudiated confessions. We are satisfied that the confessions were not safe and ought not to have been relied upon in this case.

53. I therefore chose not to admit the confession as part of the record.

54. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of November, 2019.

A.C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Brian Mboya Counsel for the Accused person.

Mr. Kimanthi, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.